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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/583,558	06/19/2006	Masaki Iwasaki	292752US0PCT	9831
22850 7590 03/31/2008 OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, P.C. 1940 DUKE STREET ALEXANDRIA, VA 22314			EXAMINER THAKUR, VIREN A	
			ART UNIT	PAPER NUMBER
			1794	
			NOTIFICATION DATE	DELIVERY MODE
			03/31/2008	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/583,558	IWASAKI ET AL.	
	Examiner	Art Unit	
	VIREN THAKUR	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 January 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-10 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|--|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input checked="" type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. <u>20080107</u> . |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____. | 6) <input type="checkbox"/> Other: _____. |

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. **Claims 1, 3, 5-7 are rejected under 35 U.S.C. 102(b) as being anticipated by Ohishi et al. (US 20030077374 A1), for the reasons given in the prior Office Action, mailed November 6, 2007.**

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. **Claims 1,3,5-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) in view of Shallenberger (Advanced Sugar Chemistry) for the reasons given in the prior Office Action, mailed November 6, 2007.**

6. **Claims 8 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) for the reasons given in the prior Office Action, mailed November 6, 2007.**

7. **Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) in view of Kuznicki et al. (US 5681569), Ekanayake et al. (US H001628 H) and Broz (US 20020197376) for the reasons given in the prior Office Action, mailed November 6, 2007.**

8. **Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) in view of Tsai et al. (US 4946701) and Teach**

Me Tea Cha for the reasons given in the prior Office Action, mailed November 6, 2007.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

9. Claims 1 and 3-10 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 3-5 and 7-8 of copending Application No. 10/582873 in view of Ohishi et al. (US 20030077374), for the reasons given in the prior Office Action, mailed November 6, 2007.

10. Claims 1 and 3-10 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4,8,9,11-14,18,21,25-29 of copending Application No. 11/258892 in view of Ohishi et al. (US 20030077374) for the reasons given in the prior Office Action, mailed November 6, 2007.

11. Claim 1, 3-8 and 10 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-2 and 6-11 of copending Application No. 10/583556 in view of Ohishi et al. (US 20030077374) for the reasons given in the prior Office Action, mailed November 6, 2007.

Response to Arguments

12. The urging that Applicants' tables as shown in the specification provide an unexpected result has been considered but are not deemed persuasive. It is noted that the formulations for example 1 and comparative example 1, for instance are not the same, aside from the carbohydrate sugar, and as such it is unclear as to whether the addition of ascorbic and citric acid, for example has an effect on the properties of the beverage. Even further, the sodium content in the example 1 and comparative example 1 are not equal, further making it unclear as to whether the sodium content affects the

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stability properties of the beverage. As such, the urging that applicants' tables provide a showing of unexpected results is not convincing.

13. On page 8 of the response, applicants' argue that none of the cited references disclose or suggest a composition as claimed nor the improved color stability resulting therefrom. It is noted that Ohishi et al. disclose using sugar, which is commonly known as sucrose (i.e. glucose + fructose) within the claimed range. It is further noted that having "less than 0.05 wt %, in terms of equivalent fructose amount" reads on the composition having 0 wt % equivalent fructose amount. As indicated in the interview held on January 8, 2008, it was noted that the term equivalent glucose amount and equivalent fructose amount are open to interpretation. Applicants have not defined the term "equivalent glucose" and "equivalent fructose." As such the terms are broad and read on "equivalent" as an amount of a carbohydrate sweetener, which would have corresponded with an amount of glucose equivalent to 0.0001 to 20 wt%, and similarly, less than 0.05 wt% fructose. In any case, since the claim recites less than 0.05 wt% fructose, this reads on zero percent fructose. The reference thus discloses using glucose in the claimed range.

14. Applicants arguments on pages 9-10 regarding the references to Kuznicki et al., Ekanayake et al., Broz and Tsai not disclosing or suggesting a carbohydrate content as claimed has been considered but is not deemed persuasive. It is noted that these

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references have not been relied on to teach the carbohydrate but are relied on to teach the other limitations in the claims.

15. On page 10 of the response, Applicants argue that the terms “wt. % in terms of equivalent glucose amount” and “wt. % in terms of equivalent fructose amount” are sufficiently well understood by those of ordinary skill in the art such that the metes and bounds of the claimed invention would be clear. Applicants further cite page 7, lines 18-21 to describe that the glucose and fructose may be supplied as a mixture or as a carbohydrate. Applicants further state that those “of ordinary skill in the art would readily appreciate that this description describes a wt. % of glucose and a wt. % of fructose which are either present in the composition as monosaccharides or are present in a form which would product glucose and fructose.

This argument has been considered but is not deemed persuasive. It is respectfully noted that applicants have not defined “equivalent glucose” and “equivalent fructose.” The terms equivalent glucose amount and equivalent fructose amount, as discussed above, read “equivalent” in terms of a carbohydrate sweetener having a sweetness which would have corresponded with an amount of glucose equivalent to 0.0001 to 20 wt%, and similarly, less than 0.05 wt% fructose. It is clear as to what would be the wt.% of glucose and the wt.% of fructose, however the claims recites equivalent glucose and fructose amount. The term equivalent glucose amount and equivalent fructose amount are broad and read on the interpretation discussed above.

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16. Based on the discussion above regarding the term “equivalent” and also the discussion above regarding Ohishi et al. teaching the claimed carbohydrate percentages, the rejections under the judicially created doctrine of nonstatutory obviousness type double patenting have been maintained for the reasons given in the prior Office Action, mailed November 6, 2007.

Conclusion

17. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VIREN THAKUR whose telephone number is (571)272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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/Steve Weinstein/
Primary Examiner, Art Unit 1794

/V. T./
Examiner, Art Unit 1794